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Attorneys for Use – Plaintiff  
F. RODGERS CORPORATION, a California Corporation

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RICHARD W. WIERING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, FOR THE  
USE AND BENEFIT OF F. RODGERS  
CORPORATION, a California Corporation

Plaintiff,

v.

WESTERN SURETY COMPANY,

Defendant.

CV 08 2676 MHP

COMPLAINT TO RECOVER ON  
MILLER ACT PAYMENT BOND  
(40 U.S.C. § 3131 *et seq.*); DEMAND FOR  
JURY TRIAL

Use-Plaintiff F. RODGERS CORPORATION (hereinafter "F. RODGERS") complains and  
alleges:

1. This action is brought pursuant to and jurisdiction is conferred by Title 40, United  
States Code, sections 3131-3134.

2. At all times relevant herein F. RODGERS was and now is a California corporation,  
doing business and having its principal place of business in the County of Alameda, State of  
California. F. RODGERS was formerly known as F. RODGERS SPECIALTY CONTRACTORS,  
INC.

3. At all times relevant herein, defendant WESTERN SURETY COMPANY  
(hereinafter "SURETY" or "Defendant") was and now is a corporation authorized and licensed to  
do business and is doing business in the State of California as a surety issuing bonds required by law  
or contract by the United States and various agencies within the jurisdiction of this Court.

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1           4.       At all times relevant herein, Taber Construction, Inc. (hereinafter "Taber") was and  
2 now is a California corporation, having its principal place of business in the County of Contra Costa,  
3 State of California.

4           5.       Taber, as a general contractor, entered into a written contract with the United States  
5 of America, by and through the National Park Service, Contract No. 1443N8000060910 (hereinafter  
6 "Prime Contract") by the terms of which Taber agreed to construct, alter and/or repair a public  
7 building known as the Sala Burton Maritime Museum in San Francisco, California (hereinafter "the  
8 Project.")

9           6.       Under 40 U.S.C. §§ 3131 *et seq.*, Taber, as principal, and defendant SURETY, as  
10 surety, executed and delivered a payment bond to the United States, whereby Taber and SURETY  
11 bound themselves jointly and severally for the purpose of allowing a joint action or actions against  
12 any or all of them and bound themselves in a sum of money equal to the contract price.

13           7.       Thereafter, Taber entered into a written subcontract with F. RODGERS to perform  
14 certain work on said Project, consisting of manufacture and installation of windows and doors for  
15 the Project. A copy of the subcontract between Taber and F. RODGERS is attached hereto as  
16 Exhibit A and incorporated herein by reference.

17           8.       Under the subcontract between Taber and F. RODGERS, Taber initially agreed to pay  
18 F. RODGERS \$2,008,498.00 for said labor, material, services and equipment.

19           9.       By letter dated November 27, 2006, Taber directed F. RODGERS to proceed with  
20 the work. F. RODGERS did so.

21           10.       Between December 2006 and February 2008, F. RODGERS furnished labor, material,  
22 services and equipment pursuant to subcontract between Taber and F. RODGERS, and at the specific  
23 request of Taber, in execution of the work required in the Prime Contract between Taber and the  
24 United States.

25           11.       Pursuant to the subcontract between Taber and F. RODGERS, F. RODGERS was  
26 required to use a specified manufacturer, Next Door Company, for manufacture of the window  
27 frames and doors for the Project.

28       ////

1           12.     The plans and specifications for the Project required the window frames to be straight,  
2 plumb and even, and required no more than a quarter inch variance between all sides of the window  
3 frame and the concrete openings. The concrete openings were shown to be square on the plans and  
4 specifications for the Project.

5           13.     In February 2008, F. RODGERS attempted to install the window frames. It  
6 discovered that the openings for the window frames were not square, as shown on the plans and  
7 specifications. F. RODGERS is informed and believes, and thereon alleges, that the demolition of  
8 the existing window frames by Taber resulted in uneven plaster of varying thickness around the  
9 edges of the window frames. The varying thickness of the plaster from the top to bottom of the  
10 openings resulted in uneven, warped or racked conditions, which had not been shown on the plans  
11 and specifications.

12           14.     F. RODGERS advised Next Door Company of the uneven, warped or racked  
13 conditions of the window openings.

14           15.     Next Door Company informed F. RODGERS that it was not possible to manufacture  
15 the window frames out of square to the degree that Taber wanted.

16           16.     The uneven, warped or racked condition of the window frame openings were not  
17 disclosed to F. RODGERS prior to the execution of the Contract between Taber and F. RODGERS,  
18 and was not otherwise known to F. RODGERS at the time of the execution of the subcontract  
19 between Taber and F. RODGERS.

20           17.     F. RODGERS sought guidance from Taber, informally and through formal Requests  
21 for Information, on how to proceed given the conditions at the job site. Notwithstanding Taber's  
22 failure to disclose that site conditions would be different than before, and notwithstanding  
23 F. RODGERS' lack of knowledge of those different site conditions, F. RODGERS told Taber that  
24 it would complete its work at Taber's direction, and that a change order might be required due to the  
25 necessary extra work and additional expense not contemplated at the time of the execution of the  
26 subcontract between Taber and F. RODGERS.

27           18.     As a result of the uneven, warped or racked condition of the window frame openings,  
28 F. RODGERS would have had to perform extra work and incur additional expense to complete its



1 obligations under the subcontract between Taber and F. RODGERS. This extra work and additional  
2 expense were not contemplated at the time of the execution of the subcontract between Taber and  
3 F. RODGERS.

4 19. Instead of responding to F. RODGERS' requests for direction from Taber, Taber  
5 terminated F. RODGERS.

6 20. Termination of the subcontract between F. RODGERS and Taber made further  
7 performance of the subcontract impossible by F. RODGERS.

8 21. At the time that Taber terminated F. RODGERS, F. RODGERS had already furnished  
9 and provided labor and materials for which Taber owed F. RODGERS \$1,046,809.97.

10 22. F. RODGERS fully and completely performed all promises on F. RODGERS' part  
11 to be performed under its subcontract with Taber, and under the bond, except where said  
12 performance was made impossible by the actions of Taber or the National Park Service, or their  
13 agents or employees. All of the conditions precedent to performance on the part of Taber and  
14 SURETY, and each of them, have occurred.

15 23. Of the total amount owed to F. RODGERS by Taber for the labor, material, services  
16 and equipment it furnished to Taber, only the sum of \$25,724.43 has been paid, leaving a balance  
17 of \$1,046,809.97 remaining due, owing and unpaid to F. RODGERS.

18 24. F. RODGERS last furnished labor, material, services and equipment on the Project  
19 within the year immediately preceding the date on which this Complaint was filed.

20 25. A period of 90 days has elapsed since F. RODGERS last provided labor, material,  
21 services and equipment to Taber.

22 26. On April 9, 2008, F. RODGERS initiated arbitration with Taber, pursuant to the  
23 requirements of the subcontract between Taber and F. RODGERS. F. RODGERS invited SURETY  
24 to participate in the arbitration. SURETY declined.

25 27. Under the payment bond executed between Taber and SURETY, SURETY is jointly  
26 and severally obligated to provide payment to F. RODGERS for work performed on the Project.  
27 Accordingly, on the failure of Taber to compensate F. RODGERS for the work performed, SURETY  
28 is obligated to pay F. RODGERS the amount set forth above.

WHEREFORE, the United States of America, for the use and benefit of F. RODGERS, prays for judgment against SURETY as follows:


**PRAYER**

1. For the sum of \$1,046,809.97, plus unknown consequential damages, and such additional sums that become due up to the date of trial, according to proof;
2. For interest on said sum at the legal rate per annum from February 14, 2008, through the date of judgment;
3. For attorneys' fees as allowed by contract or statute;
4. For costs of suit incurred herein; and
5. For such other and further relief as the Court deems proper.

DATED: May 27, 2008

**LAW OFFICE OF  
ROBERT A. HUDDLESTON**

By

  
JOAN E. PRESKY, ESQ.  
Attorneys for Use – Plaintiff F. RODGERS  
CORPORATION, a California Corporation


**DEMAND FOR JURY TRIAL**

Use – Plaintiff F. RODGERS CORPORATION, a California Corporation demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: May 27, 2008

**LAW OFFICE OF  
ROBERT A. HUDDLESTON**

By

  
JOAN E. PRESKY, ESQ.  
Attorneys for Use – Plaintiff F. RODGERS  
CORPORATION, a California Corporation

JS 44 (Rev. 12/07) (and rev 1-16-08)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM)

## I. (a) PLAINTIFFS

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF  
F. RODGERS CORPORATION, a California Corporation

## DEFENDANTS

WESTERN SURETY COMPANY

(b) County of Residence of First Listed Plaintiff  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant **CONTRA COSTA**  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Law Office of Robert A. Huddleston  
500 Ygnacio Valley Road, Suite 300  
Walnut Creek, CA 94596  
Tel: (925) 947-0100

Attorneys (If Known)

Mark S. McKibbin, Esq.  
CNA Surety  
333 South Wabash Avenue, 41st Floor  
Chicago, IL 60604

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 10 Insurance <input type="checkbox"/> 120 Marine <input checked="" type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 160 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

40 U.S.C. Sections 3131 et seq.

Brief description of cause:

Recovery on Miller Act payment bond

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 1,046,809.97

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

## IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE  
May 27, 2008

SIGNATURE OF ATTORNEY OF RECORD

*[Signature]*